

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
WSD UNITED	:	
TRANSPORTATION, INC.	:	DETERMINATION
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period September 1, 1977	:	
through May 31, 1980.	:	

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Petitioner, WSD United Transportation, Inc., 1898 Buffalo Avenue, Niagara Falls, New York 14303, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1977 through May 31, 1980 (File No. 804466).

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 65 Court Street, Buffalo, New York, on July 28, 1988 at 2:45 P.M., with all evidence to be submitted by September 8, 1988. Petitioner appeared by Edward P. Perlman, Esq. The Audit Division appeared by William F. Collins, Esq. (Irwin Levy, Esq., of counsel).

ISSUES

I. Whether petitioner timely filed a petition for a hearing with the former State Tax Commission pursuant to Tax Law §§ 1138(a) and 1147(a).

II. If so, whether the Audit Division properly determined additional tax due as a result of a field audit of petitioner.

FINDINGS OF FACT

1. On May 27, 1981, following an audit, the Audit Division issued to petitioner, WSD United Transportation, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1977 through May 31, 1980 which assessed \$11,803.19 in tax due plus minimum interest.

2. On November 4, 1980 petitioner, by its then-president, William Santiago, executed a consent extending the period of limitation for assessment of sales and use taxes for the period September 1, 1977 through May 31, 1980 to June 20, 1981.

3. On April 3, 1987, a petition dated March 27, 1987 was received by the Tax Appeals Bureau in respect of the May 27, 1981 notice of determination.

4. The filing of the petition in 1987 was triggered by the issuance of a warrant on

December 22, 1986 in respect of the assessment herein.

5. At some point during 1981, petitioner's then-accountant, Robert W. Baker, contacted the office of State Assemblyman Matthew J. Murphy regarding petitioner's dispute with the Audit Division arising from the audit. Following Mr. Baker's contact, a letter dated September 25, 1981, written for Mr. Murphy's signature, was generated and addressed to Ralph J. Vecchio, Counsel, Department of Taxation and Finance. An unsigned copy of said letter was introduced into evidence at the hearing. The letter provided, in part:

"I have been in contact with the accountant for the United Cab Company in regard to a problem which they are experiencing with your Department.

\* \* \*

The Company is most anxious to have this matter resolved since they have heard nothing from the Department since December 1980 when they attended a pre-assessment hearing.

\* \* \*

I would greatly appreciate your investigation into this matter so as to resolve the matter once and for all."

6. At hearing, petitioner introduced into the record an affidavit of Robert W. Baker dated March 16, 1987. As stated previously, Mr. Baker was petitioner's accountant at the time of the audit and the issuance of the notice. The affidavit stated, in part, the following:

"3. In January, 1981 your deponent, along with Attorney John Papsidero, represented WSD United Transportation, Inc. at a special assessment conference in Buffalo, New York.

4. Subsequent to said conference, a consent to fixing of tax (Form AU-3) was issued on March 3, 1981 for the tax period November 30, 1977-May 31, 1980 indicating an assessment in the amount of \$11,803.19 plus interest.

5. Within 90 days from the issuance of such determination your deponent caused to be filed a petition with the Tax Appeals Bureau, contesting the determination and assessment, by depositing the appeal with the U.S. Postal Service by 1st class mail.

6. Your deponent never received a response from the State Tax Commission to the aforesaid petition nor, to the best of your deponent's knowledge was any other representative of the Corporation notified of the status of the petition."

7. No evidence was presented at hearing to show that a petition in respect of the May 27, 1981 notice was received prior to April 3, 1987.

#### CONCLUSIONS OF LAW

A. Tax Law § 1138(a)(1) provides, in pertinent part, that "[n]otice of such determination shall be given to the person liable for collection or payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the division of tax appeals [formerly tax commission] for a hearing...."

B. The general rule of Tax Law § 1138(a)(1) is that the petition must be actually delivered to the Division of Tax Appeals (formerly State Tax Commission) within the 90-day period (see\_\_\_\_, Matter of Sipam Corporation, Tax Appeals Tribunal, March 10, 1988). Where a petition is not actually delivered to the Division of Tax Appeals, even proof of ordinary mailing is insufficient to prove timely filing of said petition under Tax Law § 1147(a)(2) (see\_\_\_\_, Matter of Sipam Corporation, supra; Matter of Micro-Carburetor Corporation, State Tax Commission, June 30, 1986).

Here, the evidence presented to show that a petition was mailed by petitioner's former accountant within 90 days of the issuance of the notice of determination is insufficient. Mr. Baker's affidavit, sworn to almost six years after the fact, fails to establish petitioner's contention. It is noted that no copy of the petition was offered into evidence. However, even if mailing was proven, the aforecited cases make clear that such proof is insufficient, as a matter of law, to prove timely filing of the petition under Tax Law §§ 1138(a)(1) and 1147(a)(2). Accordingly, it is determined that petitioner failed to timely file a petition in respect of the notice of determination issued to it on May 27, 1981.

With respect to the letter of Assemblyman Murphy, dated September 25, 1981, it is noted that no proof of receipt of said letter by the Audit Division was offered into the record. However, even if it were determined that the letter constituted a petition and even if receipt of the letter by the Audit Division were proven, the September 25, 1981 date of the letter falls well beyond the 90-day period imposed by Tax Law § 1138(a)(1). The September 25, 1981 letter, therefore, fails to fulfill the filing requirements imposed upon petitioner by Tax Law §§ 1138(a)(1) and 1147(a)(2).

It should also be noted that petitioner did not dispute that it received the May 27, 1981 notice of determination. Thus, the rebuttable presumption of petitioner's receipt of said notice has not been raised as an issue herein and the lack of evidence in the record as to proof of proper mailing of the notice may not be considered to rebut the presumption of receipt (see\_\_\_\_, Tax Law § 1147[a][1]; Matter of T. J. Gulf, Inc. v. State Tax Commn., 124 AD2d 314; Matter of Mildred Colon, State Tax Commn., March 11, 1987).

C. In light of the conclusion reached herein with respect to the jurisdictional issue, Issue II is moot.

D. The petition of WSD United Transportation, Inc. is dismissed.

DATED: Albany, New York  
January 12, 1989

Alston\_\_\_\_\_  
/s/ Timothy J.  
ADMINISTRATIVE LAW JUDGE